IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.414 OF 1990

1. Mahadeo Bhagoji Thorat
   R/o. Kalyan,
   Dist: Thane.

2. Kisan Bhagoji Thorat,
   Occ: Agriculture,
   Res. of Manchar

3. Smt. Jaibai Kashinath Thorat,
   Occ: Household,
   Res, Kurla, Bombay

4. Datatraya Kashinath Thorat,
   Occ: Service,
   Res. Kurla, Bombay.

5. Khandu Kashinath Thorat,
   Occ: Education,
   Guardian Plaintiff No.3

6. Asha Kashinath Thorat,
   Occ : Education.
   Guardian Plaintiff No.3

7. Nanabhai Baburao Temkar,
   Occ: Service,
   Awasari Khd.

8. Saibai Baban Pokharkar,
   Occ: Household,
   R/o.Manchar, Shewalwadi.

9. Gaubai Dyaneshwar Taware,
   Occ: Agriculture
   Nirgudsar.

10. Reobai Bapu Dighe,
    Occ: Agriculture,
    Valvatwadi ..Appellants
    (Original Plaintiffs)

versus

Bhima Sakharam Thorat,
since deceased by his heirs
& legal representtives

1. Chandrabhaga Bhimaji Thorat

2. Bajrang Bhimaji Thorat
Occ: Agriculturist,
Shrikrishna Raswanti Gruha,
Majid Tailor Chawl,
Tarseva Sadan Road, Asalfa Village,
Ghatkoper (East), Mumbai 84.

3. Sambhaji Bhimaji Thorat,
since deceased by his heirs
& legal representatives

i) Smt. Shardabai Sambhaji Thorat
ii) Miss Russilesha Sambhaji Thorat
iii) Kum.Sudhatai Sambhaji Thorat
Nos.(ii) and (iii) minor
represented by their mother
and natural guardian No.1
Smt. Shardaba Sambhaji Thorat

4. Kum. Pravina Bhimaji Thorat,
Nee Pravina Lesurkar
all residents of Ghatkoper,
Mumbai 400 084

5. Sou Mangal Baburao Dudhode,
Civil Hospital Colony,
Nagar, At Post, Tal - Dist :Nagar,
..Respondents.

Mr.V.S.Gokhale for Mr. B.P.Apte for the Appellant

Mr.V.Y. Savaji for Mr. Prafulla B. Shah for the Respondent Nos.1 to 4.

Coram : S.R.Sathe, J.
Dated : 29th June, 2006

JUDGMENT

1. Appellants, the original plaintiffs in Regular Civil Suit No.86 of 1981 have preferred this

appeal against the judgment and order passed by the Court of 6th Additional District Judge, Pune, whereby the order passed by the trial court dismissing the plaintiffs suit for specific performance of agreement to reconveyance was confirmed and appeal was dismissed. For the sake of convenience, hereafter, the parties shall be referred to as plaintiff and defendants.

2. Brief facts giving rise to this appeal are as under:

. The suit land described in detail in para 1 of the plaint was originally owned by Bhagoji Laxman Thorat. The plaintiff Nos.1 and 2 are the sons of Bhagoji, while the plaintiff No.3 is the daughter in law of Bhagoji. The said Bhagoji had borrowed amount of Rs.4000/- to meet his household expenses and for that purpose he has executed sale deed of the suit property in favour of the defendant on 21.2.1976 and handed over the possession of the suit land to him. On that very day the defendant executed an agreement to reconvey the property on the condition that if the amount is paid by Bhagoji to defendant within period of five years, the land

can be recovered. It is the plaintiff's case that in December 1979 Bhagoji approached the defendant and requested him to reconvey the suit land. The defendant, however, told him that the limitation of the said agreement has not expired and that he would execute the sale deed. On 12.8.1980 Bhagoji died. Thereafter the plaintiff Nos.1 to 3 approached the defendant and asked him to reconvey the property. However, at that time also the defendant told them that the period of limitation of the said agreement to reconvey is not over. On 18.12.1981 again the plaintiffs requested the defendant to execute the sale deed, but he did not agree. Hence, plaintiff filed the present suit for specific performance of the agreement to reconvey, executed by the defendant.

3. The defendant filed his written statement at Exhibit 19 and contended that the transaction between him and Bhagoji was of sale out and out. According to him deceased Bhagoji had infact accepted Rs.2500/- from defendant on 18.12.1975 and executed the agreement to sale. He also contended that in pursuance to the said agreement, subsequently sale deed has been executed by Bhagoji.

The defendants specifically contended that he had never executed the agreement to reconvey and the alleged agreement relied upon by the plaintiffs is not signed by him. He also denied plaintiffs allegation that Bhagoji, or after his death the present plaintiffs approached him and requested him to reconvey the property. According to him as there was no agreement of reconveyance there was no question of of executing the reconveyance deed. He, therefore, prayed for the dismissal of the suit.

4. On these pleadings the learned trial Judge framed issued at Exhibit 20. In order to prove the suit claim, plaintiff No.1 examined himself and two other witnesses namely Tukaram Thorat, the attesting witness of the sale deed and Baban Kale, P.W.3 the scribe. As against this, the defendant examined himself.

5. After considering the evidence adduced by both the parties, the learned Trial Judge came to the conclusion that the plaintiffs have miserably failed to prove that the defendants executed the agreement of reconveyance on 21.2.1976. Naturally, he dismissed the plaintiffs suit.

6. Being aggrieved by the said judgment and order, the plaintiffs filed Regular Civil Appeal No.256 of 1987. After hearing the agruments of both the learned Advocates, the First Appellate Judge also came to the conclusion that the transaction between Bhagoji and defendant was of sale out and out. The plaintiffs failed to prove that the defendant executed the agreement to reconvey the property. He, therefore, confirmed the order of dismissal of the suit and dismissed the appeal.

7. The above mentioned order is challenged by the plaintiffs in the present second appeal. From the perusal of the record it appears that while admitting the appeal this Court (Coram: I.G.Shah, J) on 17.9.1990 has passed the following order:

> "Admit. Substantial Question of Law in respect of ground Nos.10, 11 and 12."

The said grounds are as under:

> "10. Whether the lower Appellate Court was right in holding that Tukaram was a casual signatory to the document and that he is interested witness to give a finding against the plaintiff.

11. Whether the evidence of an attesting witness can be disbelieved only on the ground that he knows nothing about the transaction.

12. Whether the Lower Appellate Court was right in holding that the plaintiffs have utterly failed to prove that the transaction was that of sale with a condition of repurchase."

In this appeal before me Shri Gokhale, learned Advocate for the plaintiffs has urged only two points. Firstly, he submitted that the courts below have not properly appreciated the evidence on record. According to him the courts ought to have considered that the attesting witness as well as scribe Kale have stated that the agreement to reconvey the suit land is signed by the defendant. Moreover, the court ought to have compared the signatures on the agreement to sale and other admitted documents of the defendant and should have held that the plaintiffs have proved that the agreement to reconvey is signed by the defendant and decreed the suit in plaintiffs favour. As against this the learned Advocate for the defendant supported the judgment and order passed by the Courts below.

8. It is not in dispute that the suit land was

initially owned by the Plaintiff Bhagoji Laxman Thorat, father of plaintiff Nos.1 and 2. The plaintiffs themselves have produced the agreement to sale dated 18.12.1975 at exhibit 54. From the perusal of the same it is very clear that on that day Bhagoji had accepted the amount of Rs.2500/- and agreed to sale the suit property to the defendant by executing the agreement to sale and even on that day the defendant was put in possession of the suit land. If we peruse the sale deed dated 21.2.1976 - Exhibit 53 it is very clear that there is also reference of this agreement to sale. So from the recitals in the said two documents, namely the agreement to sale as well as the sale deed it is very clear that it is nowhere specifically mentioned that the relation between Bhagoji and defendant were that of debtor and creditor. On the contrary, execution of agreement to sale and subseqeunt execution of the sale deed in fact goes to show that the intention of Bhagoji was to sale the suit property to meet the household expenses. Merely because he decided to sale the suit property for particular reason, namely to meet his needs one can’t jump to the conclusion that the transaction between Bhagoji and defendant was not that of sale

out and out. On the contrary, as observed by the learned First Appellate Judge the execution of the agreement to sale and the sale deed in pursuance of the same is important circumstances which in fact indicates that the intention of the parties was to enter into transaction of sale.

9. It is true that the plaintiff No.1 has examined himself and has stated that the land in question has been sold by his father to defendant and his father told him that the defendant has agreed to reconvey the suit property, However, from his evidence it is crystal clear that the witness no.1 who has deposed on behalf of the plaintiff was not present at the time of the suit transaction and as such his evidence is infact of no use to prove plaintiffs case. His evidence is of hearsay nature. It must also be remembered that Plaintiff no.1 has stated that after the death of Bhagoji when they searched they found the agreement to reconvey in the bag of Bhagoji. This is also rather strange and unbelievable. If really Bhagoji had told the plaintiff No.1 about defendant No.1 executing the agreement to sale then normally at that very time the witness namely Plaintiff No.1 would have asked

Bhagoji to show the agreement to reconvey, but that has also not happened. So, under such circumstances, his evidence is certainly of no use to plaintiffs. So far as P.W.2 Tukaram Thorat is concerned, it does appear that he is an attesting witness to the sale deed Exhibit 53 as well as to the alleged agreement of reconveyance Exhibit 32. However, the said witness has stated that on that day in his presence the transaction took place and the defendant paid Rs.4000/- to Bhagoji. However, if we see the recitals in the registered sale deed Exhibit 53, it is very clear that on that day the defendant had in fact not at all paid Rs.4000/- to Bhagoji but he had paid only Rs.300/-. Naturally, it appears that though Tukaram Thorat has signed the said document as an attesting witness, he has in fact no personal knowledge about the transaction in question. Moreover, it does appear that Tukaram Thorat is having close contacts with plaintiffs. In fact it is the plaintiff's case that when the amount of Rs.4000/- was to be repaid to defendant they had kept the said amount with Tukaram and the said witness has stated that the said amount is still with him. This is also rather strange. No one would keep the said amount with Tukaram particularly

when no immediate transaction was to take place. It is not the case that the defendant had suggested that if plaintiffa are ready to pay the amount of Rs.4000/- they should keep the said amount with Tukaram. So, under such circumstances, the courts below have not relied upon the testimony of the witness Tukaram Thorat holding that Tukaram is interested witness and has deposed to oblige plaintiffs. Under the circumstances, the view taken by the courts below with regard to this witness cannot be said to be totally unreasonable or perverse in the background of all other circumstances of the case.

10. There is another important piece of evidence or circumstance which also goes to show that the defendant must not have agreed to reconvey the suit land. It has come on record that after the land was purchased by the defendant and he was put in possession of the same, he spent about Rs.10,000/- to 15,000/- i.e. amount which is about three and half times more then the consideration fixed of the land, for improvements of the land. If really there would have been any agreement to reconvey, then certainly one would not have spent such huge amount

for the improvement of the suit land. So, this is also a circumstance which must be read in favour of the defendant and against the plaintiffs.

10. The plaintiffs have also examined the scribe Kale. He has stated that the two documents namely sale deed Exhibit 53 and the alleged agreement to reconvey Exhibit 32 have been written by him as per the say of the parties and the parties have signed it. The said witness was however not in a position to produce the register in question wherein there is entry of the above mentioned two documents. However, that by itself will not be sufficient to discredit his testimony if the contents of the above mentioned two documents are in his handwriting. However, under the circumstances of the case when it appears that the defendant had specificaly denied his signatgure on the document in question the courts below did not find it safe to rely on the scribe. He was not in a position to give other details with regard to the case.

11. I really fail to understand as to why in the instant case the plaintiffs did not move the court for sending the document in question namely the

agreement to reconvey the property to the handwriting expert, particularly when the contention of the defendant was that he has not at all executed any agreement and the agreement produced does not bear his signature. If the plaintiffs were so sure that the document in question is signed by the defendants, under the circumstances of the case plaintiffs, in my opinion ought to have made such efforts because after all the burden to prove that the document in question is executed and signed by the defendant was on the plaintiffs. So, applying the principal of best evidence also the plaintiffs should have made such effort. However, for the reasons best known to the plaintiffs, the plaintiffs have not made such attempt.

12. No doubt when querry was made by me, the learned Advocate appearing on behalf of plaintiffs has pointed out that the trial court had in fact taken the signatures of the defendants in order to find out whether the signature appearing on the agreement to reconvey is that of defendant or not. However, it is worth to note that there is absolutely no reference to this event either in the judgment of the trial court or in the judgment of

the First Appelalte Court. It must be noted that even in this Court the learned Advocate for plaintiff did not submit any appliction to send the document in question to the handwriting expert. Considering this, I perused the agreement to reconvey as well as the signatures of the defendants taken by the trial court. However, merely from such comparison it is not safe to conclude that the signature in question is of the defendant. Incidently, it must also be noted that the plaintiffs have not examined the other attesting witness to the said document and the agreement. So, non examination of this witness also gives rise for drawing adverse inference against the plaintiffs.

13. Thus, from the above discussion it is very clear that both the courts below have recorded the concurrent finding of fact that the evidence on record is not sufficient to prove that the defendant has executed the agreement to reconvey the property (exhbit 32). So in fact there is no reason to disturb the said finding of fact in second appeal particularly when there is nothing on record to show that the Courts below have not taken into consideration any particular evidence or the

appreciation of evidence is perverse.

14. As pointed out by me above, the evidence on record is not sufficient to prove that the document in question Exhibit 32 is signed by the defendant. Comparison of the defendants signature by this court and the signature appearing at exhibit 32 at this stage would not be sufficient to hold that the said document is signed by the defendant. It is well settled that in a case where from a given circumstances two inferences are possible, one drawn by lower appellate court is binding on the High Court in second appeal. Adopting any other approach is not permissible unless it is shown that the view taken by the courts below was totally perverse. Unless there are strong and compelling reasons the High Court is not supposed to interfere with the finding of the first appellate court in the second appeal.

15. Thus, it is very clear that in the instant case there is in fact no substantial question of law involved. All that is submitted before me is that the lower court has not properly appreciated the evidence. Further, as stated above , the approach

or appreciation of evidence cannot be said to be perverse. So, having regard to all these facts and circumstances and considering the position of law I have no hesitation to hold that there is no need to interfere with the judgment and order passed by the courts below.

16. Hence the appeal is dismissed with costs.

(S.R.Sathe, J.)